

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4081

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

LOCAL 107, INTERNATIONAL LADIES'
GARMENTS WORKERS' UNION, AFL-CIO,

Intervenor,

v.

SOLBORO KNITTING MILLS, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

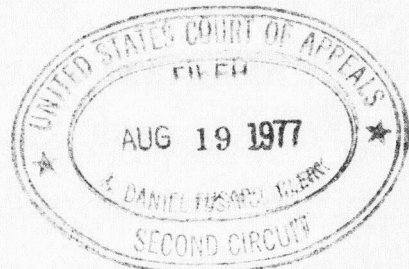
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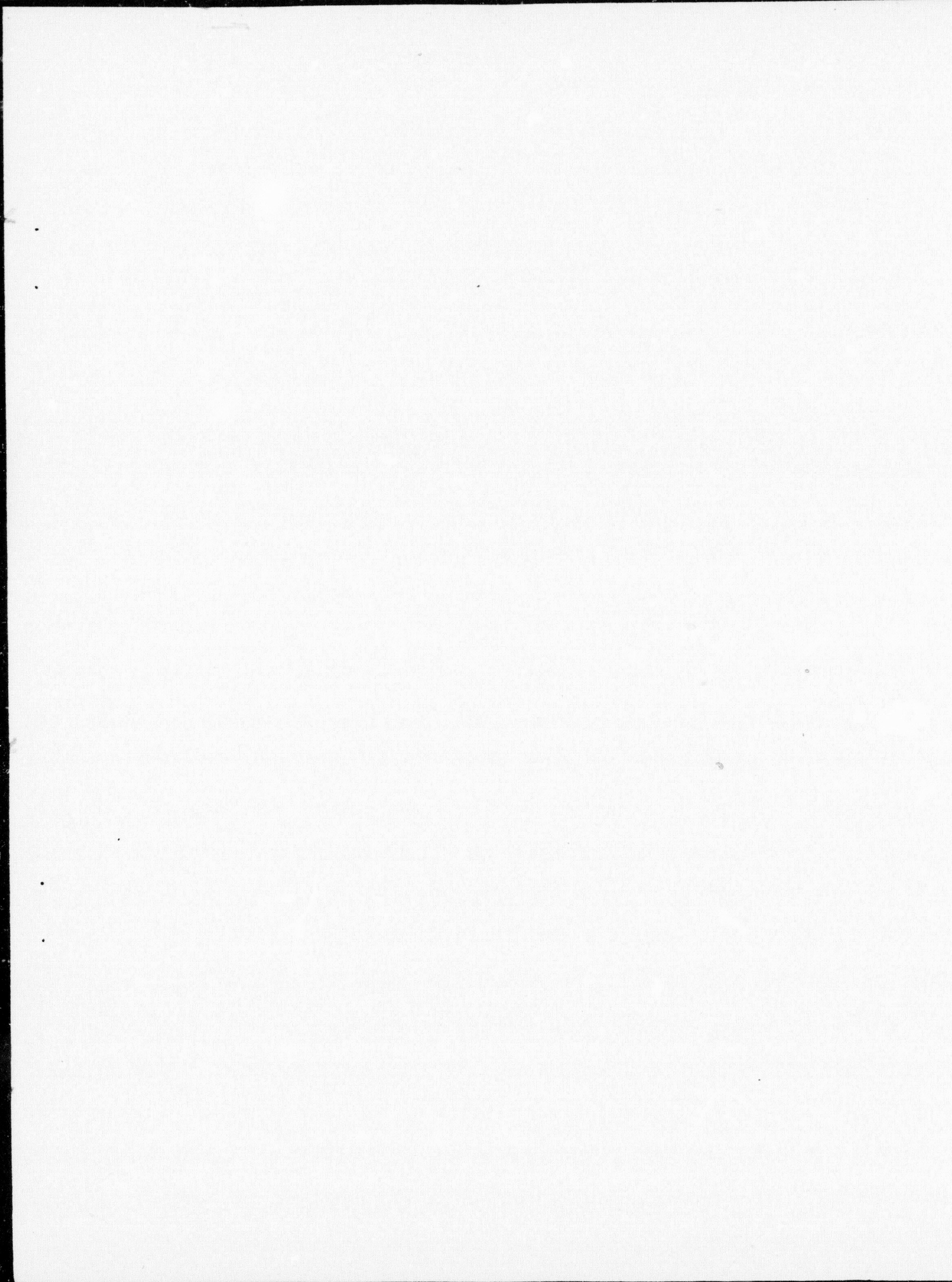
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I N D E X

	Page
Statement of issues presented	1
Statement of the case	2
I. The Board's findings of fact	3
A. Background	3
B. The Union campaign	4
C. The Union demands recognition; the Company commences its anti-Union campaign.	5
D. The discharge of Margaret Passannante.	6
E. O'Connell joins the anti-Union campaign.	7
F. The discharge of Mary White.	8
G. The Union handbills and solicits support; Rugolo and Moravec are laid off	8
H. The Company continues to question its employees regarding their union activities	9
I. The Company refuses to recall Rugolo, Moravec, White and Passannante for the next season.	10
II. The Board's conclusions and order.	12
Argument.	13
I. Substantial evidence on the record as a whole supports the Board's finding that the Company interfered with, restrained and coerced its employees in the exercise of their organizational rights, in violation of Section 8 (a) (1) of the Act	13
A. Interrogation.	14
B. Threats.	16
C. Soliciting employees to repudiate the Union.	20
D. Promises and grants of benefits.	21
II. Substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by terminating and thereafter denying re-employment to employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo	22
A. The layoffs.	22
B. The Company's discriminatory refusal to rehire Passannante, White, Moravec and Rugolo in the Spring of 1975	29
III. The Board's backpay remedy is valid and proper	33
IV. Substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8 (a) (5) by refusing to bargain with the Union and that a bargaining order is an appropriate remedy for the Company's unfair labor practices.	38
A. Applicable principles.	38

I N D E X

Hdgs.--Cont'd:

Page

B. The Union established a card majority.	39
C. The bargaining order was a proper exercise of the Board's discretion	40
Conclusion.	44

A U T H O R I T I E S C I T E D

Cases:

Page

Amalgamated Clothing Workers v. N.L.R.B., 424 F. 2d 818 (C.A. D.C., 1970).	20
American Sanitary Prods. Co. v. N.L.R.B., 382 F. 2d 53 (C.A. 10, 1967).	25
Amsterdam Wrecking & Salvage Co., Inc. v. Local 294, Teamsters, 472 F. 2d 155 (C.A. 2, 1973)	37
Ann Lee Sportswear, Inc. v. N.L.R.B., 543 F. 2d 739 (C.A. 10, 1976).	43
Bourne v. N.L.R.B., 332 F. 2d 47 (C.A. 2, 1964).	15
Bryant Chucking Grinder Co. v. N.L.R.B., 389 F. 2d 565 (C.A. 2, 1967), cert. den., 392 U.S. 908	15
Buncher Co., The, 131 NLRB 1444 (1961), enf'd, 316 F. 2d 928 (C.A. 3, 1963)	35
Byrne Dairy, Inc. v. N.L.R.B., 431 F. 2d 1363 (C.A. 2, 1970).	42
Curtiss-Wright Corp. v. N.L.R.B., 347 F. 2d 61 (C.A. 3, 1965).	44
Difco Labs., Inc., 172 NLRB 2149 (1968), enf'd, 427 F. 2d 170 (C.A. 6, 1970), cert. den., 400 U.S. 833	38
Field, Edward, Inc. v. N.L.R.B., 325 F. 2d 754 (C.A. 2, 1963).	20
Independent Sprinkler & Fire Protection Co., 220 NLRB 941 (1975), enf'd, w/o pub. op., 546 F. 2d 908 (C.A. 5, 1977).	43
I.A.M. v. N.L.R.B., 311 U.S. 72 (1940)	18
Krajewski, A. J., Mfg. Co. v. N.L.R.B., 413 F. 2d 673 (C.A. 1, 1969)	25, 32
Leeds & Northrup Co. v. N.L.R.B., 391 F. 2d 874 (C.A. 3, 1968).	37
MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75 (C.A. 2, 1973).	39
Marlin-Rockwell Corp. v. N.L.R.B., 116 F. 2d 586 (C.A. 2, 1941), cert. den., 313 U.S. 594; 133 F. 2d 258 (C.A. 2, 1943)	18, 29, 33
Nachman Corp. v. N.L.R.B., 337 F. 2d 421 (C.A. 7, 1964).	26
Nat'l Freight, Inc., 154 NLRB 621 (1965)	35
N.L.R.B. v. A & S Electronic Die Corp., 423 F. 2d 218 (C.A. 2, 1970), cert. den., 400 U.S. 833.	14, 21

I N D E X

Cases--Cont'd:

Page

N.L.R.B. v. Abbott Worsted Mills, 127 NLRB 438 (C.A. 1, 1942).	25
N.L.R.B. v. Advanced Business Forms Corp., 474 F. 2d 457 (C.A. 2, 1973).	23
N.L.R.B. v. American Cable Systems, Inc., 427 F. 2d 446 (C.A. 5, 1970), cert. den., 400 U.S. 957.	42
N.L.R.B. v. Arkansas-Louisiana Gas Co., 333 F. 2d 790 (C.A. 8, 1964).	19
N.L.R.B. v. Atkinson Dredging Co., 329 F. 2d 158 (C.A. 4, 1964), cert. den., 377 U.S. 965.	18
N.L.R.B. v. Dan River Mills, Inc., 274 F. 2d 381 (C.A. 5, 1960).	24
N.L.R.B. v. Dayton Motels, Inc., 474 F. 2d 328 (C.A. 6, 1973).	19
N.L.R.B. v. Deutsch Co., 445 F. 2d 902 (C.A. 9, 1971), cert. den., 405 U.S. 988.	20
N.L.R.B. v. De Young's, Lou, Market Basket, 430 F. 2d 912 (C.A. 6, 1970).	39
N.L.R.B. v. Diamond Standard Fuel Corp., 437 F. 2d 1163 (C.A. 1, 1971).	22
N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964).	21
N.L.R.B. v. Falls City Creamery 207 F. 2d 820 (C.A. 8, 1953).	19
N.L.R.B. v. Farrell, L. E., Co., 360 F. 2d 205 (C.A. 2, 1966).	17
N.L.R.B. v. General Stencils, Inc., 438 F. 2d 894 (C.A. 2, 1971).	16
N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969).	16, 38, 39
N.L.R.B. v. Gladding Keystone Corp., 435 F. 2d 129 (C.A. 2, 1970).	15, 16, 17
N.L.R.B. v. Grossinger's, S & H, Inc., 372 F. 2d 26 (C.A. 2, 1967).	20
N.L.R.B. v. Int'l Metal Specialties, Inc., 433 F. 2d 870 (C.A. 2, 1970), cert. den., 402 U.S. 907.	39
N.L.R.B. v. Lasaponara, A., & Sons, 541 F. 2d 992 (C.A. 2, 1976), cert. den., ___ U.S. ___ (1977), 97 S. Ct. 1325.	29, 33
N.L.R.B. v. Link-Belt Co., 311 U.S. 583 (1941).	23
N.L.R.B. v. Lorben, 345 F. 2d 346 (C.A. 2, 1965).	15
N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).	44
N.L.R.B. v. Madison Courier, Inc., 472 F. 2d 1307 (C.A. D.C., 1972).	37
N.L.R.B. v. Mastro Plastics Corp., 354 F. 2d 170 (C.A. 2, 1965), cert. den., 384 U.S. 972.	33
N.L.R.B. v. Melrose Processing Co., 351 F. 2d 693 (C.A. 8, 1965).	23

I N D E X

Cases--Cont'd:

Page

N.L.R.B. v. Mid State Sportswear, Inc., 412 F. 2d 537 (C.A. 5, 1969).	32
N.L.R.B. v. Milco, Inc., 388 F. 2d 133 (C.A. 2, 1968).	15
N.L.R.B. v. Monroe Tube Co., Inc., 545 F. 2d 1320 (C.A. 2, 1976).	20
N.L.R.B. v. Nabors, W. C., Co., 196 F. 2d 272 (C.A. 5, 1952), cert. den., 344 U.S. 865	26
N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F. 2d 725 (C.A. 2, 1965)	23
N.L.R.B. v. Patent Trader, Inc., 415 F. 2d 190 (C.A. 2, 1969), mod. <u>in banc</u> , 426 F. 2d 791 (C.A. 2, 1970)	21
N.L.R.B. v. Pembeck Oil Corp., 404 F. 2d 105 (C.A. 2, 1968), vacated and remanded, 395 U.S. 828 (1969).	24, 25
N.L.R.B. v. Princeton Inn Co., 424 F. 2d 264 (C.A. 3, 1970).	24
N.L.R.B. v. Production Industries, Inc., 425 F. 2d 1206 (C.A. 6, 1970).	42
N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F. 2d 941 (C.A. 1, 1961)	44
N.L.R.B. v. Puerto Rico Tel. Co., 357 F. 2d 919 (C.A. 1, 1966).	26
N.L.R.B. v. Remington Rand, Inc., 94 F. 2d 862 (C.A. 2, 1938), cert. den., 304 U.S. 576	37
N.L.R.B. v. Revere Metal Art Co., Inc., 287 F. 2d 632 (C.A. 2, 1961).	23
N.L.R.B. v. Reynolds, Charles T., Box Co., 399 F. 2d 668 (C.A. 6, 1968).	33
N.L.R.B. v. Rollins Telecasting, Inc., 494 F. 2d 80 (C.A. 2, 1974), cert. den., 419 U.S. 964.	17
N.L.R.B. v. Rubin, 424 F. 2d 748 (C.A. 2, 1970).	15, 16, 22, 24, 33
N.L.R.B. v. Rutter-Rex, J. H., Mfg. Co., 396 U.S. 258 (1969)	34
N.L.R.B. v. Schill Steel Prods., Inc., 340 F. 2d 568 (C.A. 5, 1965).	33
N.L.R.B. v. Scoler's, Inc., 466 F. 2d 1289 (C.A. 2, 1972).	15, 41, 42
N.L.R.B. v. South Bay Daily Breeze, 415 F. 2d 360 (C.A. 9, 1969), cert. den., 397 U.S. 915.	42
N.L.R.B. v. Superior Sales, Inc., 366 F. 2d 229 (C.A. 8, 1966).	32
N.L.R.B. v. Taber Instruments, 421 F. 2d 642 (C.A. 2, 1970).	16
N.L.R.B. v. V & H Industries, Inc., 433 F. 2d 9 (C.A. 2, 1970).	22, 33
N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920 (C.A. 2, 1965)	14
Nuodex, Div. of Tenneco Chemicals, Inc., 176 NLRB 611 (1969)	38
Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941).	18, 29

I N D E X

Cases--Cont'd:

Page

Rosenblum, Leo, 137 NLRB 1162 (1962)	35
Southern Greyhound Lines, 169 NLRB 627 (1968), enf'd, 426 F. 2d 1299 (C.A. 5, 1970).	37
Texaco, Inc. v. N.L.R.B., 436 F. 2d 520 (C.A. 7, 1971)	39
Trading Port, Inc., The, 219 NLRB 298 (1975)	43
United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85 (C.A. 2, 1971).	23

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, <u>et seq.</u>)	2
Section 2 (3).	18
Section 7.	13, 20
Section 8 (a) (1).	<u>passim</u>
Section 8 (a) (3).	2, 12, 22, 29
Section 8 (a) (5).	12, 38
Section 10 (c)	33
Section 10 (e)	2

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BRIEF FOR THE
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STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their Union activities and sympathies, by actual and implied threats of reprisals for their Union support, by promises of benefits to employees to enlist their aid during the Union campaign and by circulation of a petition of defection from the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by prematurely laying off and thereafter refusing to recall employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo because of their support for the Union.

3. Whether the Board's backpay order is proper.

4. Whether the Board properly ordered the Company to, upon request, bargain with the Union as the exclusive representative of its employees.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151 et seq.), for enforcement of its order (A. 50-51, 61-62) ^{1/} issued against Solboro Knitting Mills, Inc. on January 7, 1977. The Board's Decision and Order are reported at 227 NLRB No. 89. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Oakdale, New York.

^{1/} "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

A. Background

Solboro Knitting Mills, Inc. (herein "the Company") is a New York corporation engaged in the manufacture of knitted sweaters in Oakdale, New York (A. 2; 68-69, 72-80). At all material times, Murray Harkavy was president of the Company and Rita Harkavy was secretary-treasurer and director of personnel. Together they managed the Company and supervised its day to day operations. To assist in directing the production process, Mrs. Harkavy was also training employee Josephine O'Connell as "forelady" (A. 10; 751, 977). Although paid on an hourly basis, O'Connell's duties included maintaining Company production records, answering employees' questions and relaying Mrs. Harkavy's directions regarding assignment of work (A. 10; 509-514, 716-720).

During the 1974 Fall-Winter season, the Company employed approximately thirteen employees to operate its production machinery and to perform the related unskilled duties necessary to create and package the final garment (A. 23; 242-244, 72-80). ^{2/}

^{2/} The order of production is generally as follows: the fabric is knitted and separated; then steamed, pressed and cut into sweater parts; the sleeves and shoulders are sewn together and neck added and closed (merrow machines are used for seaming and mauser machines for binding); labels are tacked; pockets are sewn on with a Singer machine; buttons and button holes are marked and, together with collars and cuffs, are added to complete the garment. The sweater is finally cleaned, pressed, packed and shipped to the customer. (A. 23; 536-540, 873-875, 236-238.)

B. The Union Campaign

During the Summer of 1974, ^{3/} the Company's employees decided to work together to improve their working conditions; during their lunch breaks, they discussed the merits of union membership (A. 4; 649-650). Employee Grace Rugolo volunteered to contact the International Ladies Garment Workers Union Local 107 (hereafter "the Union"). Rugolo met with Union agents Clara Rhatigan and Gaspar Sciacca on July 31; at this time she signed an authorization card and furnished the Union with additional employees' names and addresses (A. 4; 653-654). In succeeding weeks, the employees continued to discuss the Union in the plant. Union agents Sciacca and Rhatigan visited with them at their homes and by October 4, a total of nine employees had signed cards authorizing the Union to represent them for collective bargaining. (A. 4; 249-278, 332, 352-358, 392-399, 450, 577-582, 492, 529, 81-88, 91.) ^{4/}

^{3/} Hereafter all dates are 1974 unless it is specified otherwise.

^{4/} Among the nine were: Grace Rugolo, Carmen Gonzales, Ana Nemec, Josephine O'Connell, Carmella Cacoperdo, Donna Moravec, Joyce Brown, Mary White and Margaret Passannante (A. 4; 81-88, 91).

C. The Union Demands Recognition; the
Company Commences its Anti-Union
Campaign

On the morning of October 4, Sciacca and Rhatigan visited Mr. and Mrs. Harkavy in their office at the plant. Sciacca demanded recognition for the Union. He further told the Harkavys that the Union represented a majority of their employees and offered to present evidence of the Union's majority support. (A. 4; 281-282). Mr. Harkavy responded that he would not see them without an appointment and told Sciacca to either make an appointment or send him a letter (A. 4; 281-282, 334-335).

Within minutes after the Union representatives left the plant, Mrs. Harkavy called employee Ana Nemec into her office and asked Nemec what she knew about the Union campaign and why she had not come to her earlier. Nemec said that she had not wanted to say anything because she supported the Union too. Mrs. Harkavy then asked Nemec whether she had signed a Union card. When Nemec admitted that she had, Mrs. Harkavy asked for the names of the other employees who supported the Union and had signed cards. Nemec told Mrs. Harkavy that although she wasn't sure, she had heard that all the employees had signed cards. Mrs. Harkavy concluded the interview and advised Nemec not to "mention this to anyone." (A. 5; 453-455.) Following her conversation with Nemec, Mrs. Harkavy approached a group of employees seated at the common lunch table and said to those assembled, "you girls want the Union?" When no one responded, Mrs. Harkavy said, "I see you girls don't want your jobs." (A. 5; 500-502.) About noon the same day, President Harkavy called all the employees in the shop to a meeting and informed them that he had just had a visit from the Union. He told them he

understood that they wanted to join the Union but added that the Company had recently lost a lot of money and he "just couldn't afford it right now." "Think it over," he advised, "otherwise [the plant] will just have to close." (A. 36-37; 621-622, 405-406, 531-533.)

That same day, the Union sent the Company a telegram confirming its visit, repeating its demand for recognition and offering to prove its majority status (A. 5; 284-285, 89). The Union never received a reply (A. 8).

D. The Discharge of Margaret Passannante

Margaret Passannante started working for the Company on September 16, as a Singer machine operator (A. 18; 346-347). Mrs. Harkavy described Passannante as an "excellent operator", "a pro from the first day on", and gave Passannante a wage increase one day after her hire (A. 349, 879-880, 1057, 1081). On Thursday, October 3, the day before the Union's recognition demand, Passannante sought Mrs. Harkavy's permission to be absent on October 4. Mrs. Harkavy replied, "O.K., I'll see you Monday." (A. 18-19; 346-347.) On the afternoon of October 4, after the Union's visit and following both Mrs. Harkavy's questioning employees concerning their Union sympathies and Mr. Harkavy's lunchtime speech concerning plant closing, Mrs. Harkavy phoned Passannante at home. Mrs. Harkavy told Passannante that, contrary to what she had earlier indicated, there was no more work for Passannante and she shouldn't come to work on Monday. (A. 19; 346-347, 361.) A few days later, when Passannante visited the plant to pick up her paycheck, she asked Mr. Harkavy when there would be more work. Mr. Harkavy responded, "We'll see when we straighten this out". (A. 19; 368-369.)

E. O'Connell Joins the Anti-Union Campaign

On Saturday, October 5, employee Josephine O'Connell drafted and signed the following letter to Union representative Sciacca (A. 11; 735-737, 771-772, 456-457, 493-493, 188):

We the undersigned have discussed your offer and have decided to withdraw our signatures. We do not wish to be represented by the International Ladies Garment Workers Union.

O'Connell then visited employees Carmella Cacoperdo, Dona Moravec and Ana Nemec, secured their signatures on the letter, and sent it to the Union (A. 11; 456, 492-495, 582-584). On Sunday, O'Connell advised her co-signers that she was going to give Mrs. Harkavy a copy of their petition on Monday (A. 12; 774-775).

On October 7, employee Cacoperdo drove to work with O'Connell, as was their usual practice (A. 41; 496). They discussed the Union campaign and the recent work slowdown. During the conversation, Cacoperdo expressed concern for her job. O'Connell replied that Mrs. Harkavy would "take care of them" when work improved, and that they would get a raise. (A. 12; 496-499, 514-515, 738-739.) Upon arriving at the plant, O'Connell gave Mrs. Harkavy a signed copy of her petition to the Union (A. 13, 40; 737, 773, 974). Later that day, O'Connell spoke with Cacoperdo for a second time regarding the Union campaign. She told Cacoperdo that Mrs. Harkavy would not take in any more work for the shop "until everything is straightened out with the Union" O'Connell added that in her view,

Mrs. Harkavy would "rather close the shop than have the Union in."
(A. 14, 41; 508-509, 521-522.)

F. The Discharge of Mary White

Mary White was hired by Mrs. Harkavy on August 27 (A. 19; Tr. 384, 388). While working for the Company, White primarily operated a mauser machine, attaching the binding on coat sweaters (A. 19; 385-387). She also operated the tacking machine (putting on fur collars and cuffs) and the labeling machine (A. 19; 386, 430-431). During the course of her employment, Mary White was frequently complimented by Mrs. Harkavy and was provided only occasional constructive criticism (A. 20; 413-414). On October 7, White worked on the mauser machine until around noon, when Mrs. Harkavy switched her to the labeling machine (A. 20; 408-409). When White completed her labeling duties and asked Mrs. Harkavy for more work, Mrs. Harkavy told her there was nothing more to do and that she should go home. Mrs. Harkavy added that White's mauser production for the day was bad and needed to be redone even though that same morning, Mrs. Harkavy had examined and specifically complimented White's work on the mauser machine (A. 20; 408, 411, 413.) Finally, Mrs. Harkavy instructed White to call the following week to see if there was available work. White did so but was informed that there was none. (A. 20; 413, 420-422.)

G. The Union Handbills and Solicits Support;
Rugolo and Moravec Are Laid Off

Grace Rugolo was hired by Mrs. Harkavy on July 22, as a merrow machine operator. About one week after Rugolo began work, Mrs. Harkavy told Rugolo that she was pleased with her work and gave her a substantial

wage increase (A. 22, 45; 643-647.) Donna Moravec began working for the Company on May 2, as a "floor girl." Her duties included trimming, buttoning, separating, steaming, and cutting pockets. (A. 21; 576-577.) In July, the Company gave Moravec a raise (A. 576).

Early on the morning of October 8, employees Rugolo, Moravec, Joyce Brown, Mary White and Margaret Passannante together with Union agents Sciacca and Rhatigan stationed themselves at the driveway to the Company's plant. Each of the employees had leaflets to distribute and a Union button to wear. Shortly thereafter the Harkavys drove up and stopped their car near the employees. Mr. Harkavy told Sciacca to get off his property and Sciacca protested. (A. 17; 287-291, 336-338, 367, 419-420, 589-590, 657-662, 90.) When it came time to go to work, Moravec, Brown and Rugolo entered the plant wearing their Union buttons (A. 17; 292-293, 590). Mrs. Harkavy approached Rugolo and asked her if it wasn't illegal to wear the Union buttons in the plant. After Rugolo replied that it was not against the law, Mrs. Harkavy said that she didn't want Union buttons worn in her "house". (A. 17; 534-535, 658-659.) Before the end of work that day, and without any prior warning, Mrs. Harkavy told both Rugolo and Moravec to go home as she had no more work for them (A. 21, 22; 592-593, 664).

H. The Company Continues to Question its
Employees Regarding Their Union Activities

About October 9, employee Andrew Zimmerman asked Mrs. Harkavy what was happening with the Union. Mrs. Harkavy responded "Don't worry about it." Zimmerman then told Mrs. Harkavy that he had been contacted by someone who

wanted to see him. The next day, Zimmerman told Mrs. Harkavy that Union agent Sciacca had come to see him. Mrs. Harkavy then questioned Zimmerman, "Andrew, you told me yesterday you were not interested in anything. How come you spend so much time with Mr. Sciacca?" (A. 17; 970.)

On October 10, upon returning to the plant to pick up her paycheck, Rugolo got into an argument with Mr. Haravy about her presence in the working area of the plant (A. 17; 666). Later that day, employee Carmen Gonzalez was called into the office and asked to sign a paper recording the Harkavy's version of the occurrence (A. 17; 623-624). During the conversation, Mrs. Harkavy questioned Gonzalez about the Union. She asked Gonzalez what was going on "with the Union and the girls" and whether Gonzalez herself was a Union member. Gonzales replied "I signed a card just like all the other girls [but] I'm not a Union member now." Mrs. Harkavy then asked Gonzales what Rugolo "was trying to accomplish." Gonzales said that she didn't know. (A. 17; 623-628.)

I. The Company Refuses to Recall Rugolo,
Moravec, White and Passannante for
the Next Season.

By the end of November, the Company's Fall season ended and the remaining employees were laid off (A. 23; 219-235). When the next season began in May 1975, the Company began recalling its more senior employees. Nemec and O'Connell returned on May 12, presser Philip Kilz on May 28, Cacoperdo on June 3, Eve on June 11, and Delfino on June 16 (A. 27; 158-178). The Company also placed advertisements in the newspaper in June, July and August, 1975 seeking:

"OPERATORS, MERROW, SINGER, FLOOR HELP, STEAMER" (A. 27; 179-187). Its advertisement of September 26, 1975 read: "OPERATORS, FLOOR HELP, STEAMER. WILL TRAIN IF QUALIFIED." (A. 27; 186-187). In June, July, and August 1975, the Company hired thirteen new employees. In October, one more. (A. 29; 158-178, 1005-1009.)

Meanwhile, on June 23, 1975, Grace Rugolo wrote to Mrs. Harkavy requesting recall (A. 29; 152). On July 1, 1975, Mrs. Harkavy wrote back refusing to reinstate Rugolo. Her letter began, "I received your registered letter Saturday, but I think you know what my answer is going to be." Mrs. Harkavy also accused Rugolo, for the first time, of having been "vulgar" and "abusive" to her during the previous season. (A. 29; 153.)^{5/}

Although she had earlier indicated to Mr. Harkavy her plan to attend business courses at college, Donna Moravec wrote to Mrs. Harkavy on July 14, 1975, stating that she was available and ready to go to work. She asked Mrs. Harkavy to respond "as soon as possible." (A. 33; 154, 1033-1036.) The Company did not reply (A. 33; 1038-1040).

^{5/} On October 8, 1974, the day Rugolo was laid off, she accused Mrs. Harkavy of failing to treat her employees properly and of being a "terrible boss." (A. 30; 660-663). She never called Mrs. Harkavy a name or used vulgar language toward her (A. 30, 44-45; 660-663, 1070-1074). When her employment was terminated in 1974, both Mr. and Mrs. Harkavy told Rugolo that it was because of the lack of work and neither indicated that she would not be re-employed because of her criticism of Mrs. Harkavy (A. 30, 44-45; 660-663, 999-1000, 1070-1074).

Mary White and Margaret Passannante wrote to Mrs. Harkav on July 15 and July 21, 1975, respectively (A. 31, 34; 156, 157). Both White and Passannante stated, in essence, that they had read the Company's newspaper advertisements for operators and that they wanted to return to work (A. 31, 34; 156, 157). The Company did not reply (A. 31, 34; 1022, 1030-1031).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their and other employees' Union activities, by actual and implied threats of reprisals for their Union support, by promises of benefits to employees to enlist their aid during the Union campaign and by circulating a petition of defection from the Union. The Board also found that the Company violated 8(a)(3) and (1) by prematurely laying off and thereafter refusing to recall employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo because of their support for the Union. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing and continuing to refuse to bargain with the Union following the Union's October 4, 1974 bargaining demand.

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from "in any other manner" interfering with, restraining and coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Company is ordered to offer reinstatement to Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo; to make them whole for any loss of earnings suffered, first, by reason of their premature layoff and, second, by their denial of rehire from the time when work first became available during the week ending May 17, 1975, until the date the discriminatees receive a valid offer of reinstatement; to bargain collectively upon request with the Union as the exclusive representative of its employees; to preserve all personnel and related records; and to post appropriate notices. (A. 50-51, 61-62.)

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR ORGANIZATIONAL RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

As shown in the fact statement, the Company responded to the Union's organizational effort with an unlawful campaign designed to thwart unionization. Threats, interrogations, promises of benefits and circulation of a petition of defection from the Union were all part of the Company's campaign to defeat the Union by inducing those who favored the Union to abandon their pro-union stands.

A. Interrogation

Immediately following the Union's demand for recognition, Secretary-Treasurer and Personnel Manager Rita Harkavy called employee Ana Nemec into her office. Mrs. Harkavy confronted Nemec with her knowledge of the Union campaign, asked Nemec what she knew about it and why she had not come to her earlier. Mrs. Harkavy then asked whether Nemec had signed a Union card and when Nemec admitted that she did, Mrs. Harkavy asked for the names of the other employees who supported the Union and had signed a card. Nemec replied that she didn't know. Mrs. Harkavy concluded the interview and warned Nemec not to "mention this to anyone." ^{6/}

Mrs. Harkavy then approached employee Carmella Cacoperdo and several other employees in the plant and asked "You girls want the Union?" Getting no response, Mrs. Harkavy warned, "I see you girls don't want your jobs."

On October 9, Mrs. Harkavy learned from employee Andrew Zimmerman that he had also spoken to the Union. She then reminded Zimmerman that he had told her the day before that he was not interested in the Union and asked why he then "spent so much time with Mr. Sciacca."

On the following day, after calling employee Carmen Gonzalez into her office ostensibly on a matter involving employee Rugolo, Mrs. Harkavy

^{6/} These findings of the Board rest on the Administrative Law Judge's resolution of credibility based upon the demeanor of the witnesses. It is settled law that it is within the special province of the Law Judge and the Board to resolve the question of credibility and those resolutions should not be overturned by a reviewing court absent extraordinary circumstances not present here. N.L.R.B. v. Warrensburg Board and Paper Corp., 340 F.2d 920, 922 (C.A. 2, 1965); N.L.R.B. v. A & S Electronic Die Corp., 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

changed the subject to the organizing campaign. She asked Gonzalez whether she was a Union member and what she knew about the other employees' Union sympathies. Gonzalez admitted that she had signed a card "just like the other girls" but felt constrained to add, "I'm not a Union member now." Mrs. Harkavy then asked Gonzalez what she thought Rugolo "was trying to accomplish". Gonzalez answered that she didn't know.

It is well settled that the coercive questioning of employees about their or other employees' union sentiments or activities, because it discourages the exercise of Section 7 rights, is a violation of Section 8(a)(1). N.L.R.B. v. Gladding Keystone Corp., 435 F.2d 129, 132-133 (C.A. 2, 1970).^{7/}

^{7/} In determining whether a particular interrogation is coercive, this Court has stated that some of the relevant considerations include: "[1] whether there is a background of employer hostility and discrimination; [2] whether the employer seeks information necessary to test a claimed majority or seeks to ferret out information most useful for purposes of discrimination, as when employees are asked to identify union supporters . . .; [3] whether the identity of the questioner and [4] the place or method of interrogation lent the activity an aura of formality that added to its coercive tendency; and [5] whether the reply was truthful so as to indicate an absence of felt intimidation, or evasive or false so as to indicate an effort by one intimidated to conceal his true allegiance." N.L.R.B. v. Milco, Inc., 388 F.2d 133, 137 (C.A. 2, 1968). Accord: Bourne v. N.L.R.B., 332 F.2d 47,48 (C.A. 2, 1964). These five criteria are not all-inclusive (N.L.R.B. v. Lorben Corporation, 345 F.2d 346, 348 (C.A. 2, 1965); Bryant Chucking Grinder Co. v. N.L.R.B., 389 F.2d 565, 567 (C.A. 2, 1967), cert. denied, 392 U.S. 908)); none of them is by itself controlling, nor is it necessary that all five indicia be present in each case. N.L.R.B. v. Gladding Keystone Corp., *supra*, N.L.R.B. v. Rubin, 424 F.2d 748, 751 (C.A. 2, 1970); N.L.R.B. v. Scoler's Incorporated, 466 F.2d 1289, 1291 (C.A. 2, 1972).

In all of these instances, the questioning was done by Rita Harkavy who, as the Company's second highest officer, was responsible not only for the Company's hiring and firing but also for the day-to-day operation of its production process (A. 857-859). Mrs. Harkavy consistently failed to explain the purpose of her inquiries and did not give any of the employees any assurances against retaliation. Moreover, all but two of the instances followed closely upon Mr. Harkavy's threat of plant closure. On one of the two remaining occasions, Mrs. Harkavy threatened the employees with the loss of their jobs. On the other occasion she warned the employee against mentioning their conversation to anyone. In these circumstances, the Board was amply warranted to find that these interrogation incidents violated Section 8(a)(1) of the Act. N.L.R.B. v. Rubin, supra; N.L.R.B. v. Gladding Keystone Corp., supra.

B. Threats

The law is settled that threats of plant closure or other reprisals if tied to union activities, violate Section 8(a)(1). N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618-620 (1969); N.L.R.B. v. General Stencils, Inc., 438 F.2d 894, 900 (C.A. 2, 1971); N.L.R.B. v. Taber Instruments, 421 F.2d 642, 643 (C.A. 2, 1970). Thus, the Company violated Section 8(a)(1) on October 4, when President Murray Harkavy told the employees that the Company could not afford a union and warned them to "think it over . . . otherwise

[the plant] will just have to close", and again, a few days later, when Josephine O'Connell echoed Mr. Harkavy's threat by telling employee Cacoperdo that if the Union campaign was successful, Mrs. Harkavy would close the shop.^{8/}

The Board properly found further violations in those Company statements which suggested that employees holding out for the Union were putting their jobs on the line. N.L.R.B. v. Gladding Keystone Corp., supra, 435 F.2d at 130-131; N.L.R.B. v. L.E. Farrell Company, Inc., 360 F.2d 205, 207 (C.A. 2, 1966). Thus, following the Company's layoff of several employees, allegedly due to a lack of work, Josephine O'Connell advised employee Cacoperdo that Mrs. Harkavy would not take on more work for the shop "until everything is straightened out with the Union." Similarly, when Passannante came to pick up her paycheck after her layoff, and asked President Harkavy when there would be more work for her, President Harkavy answered,

^{8/} It is no defense that President Harkavy may not have so intended his remarks for as this Court noted in N.L.R.B. v. Rollins Telecasting, Inc., 494 F.2d 80, 82 (1974), cert. denied, 419 U.S. 964, "an employer who goes so close to the brink takes the risk that employees may honestly misunderstand him." As the Administrative Law Judge in the instant case, properly noted (A. 37-38):

Mr. Harkavy could easily have avoided the likelihood of being misunderstood by adding that the [Company] would not close simply because of a [Union] victory but only if the Union's demands made continuation impracticable . . . Here, according to Mr. Harkavy's own testimony [A. 789, 846-847], his hinging "survival" on the avoidance of added economic expenses was couched not in the context of the Union's prospective demands, but solely in terms of the employees' "decision" or "vote" on their choice of a union.

"We'll see when we straighten this out." (A. 39; 369, 988).^{9/} The foregoing remarks conveyed the unmistakeable message to the employees that their continued support of the Union campaign would be at the expense of their opportunity for work.

Before the Board, the Company contended that it should not be held responsible for the acts of Josephine O'Connell because she was neither a supervisor nor an agent of the Company. The Board, however, correctly found that while O'Connell was not a supervisor, her conduct was chargeable to the Company because "the employees were aware of the special relationship between her and Mrs. Harkavy and in all the circumstances could reasonably have understood, as Cacoperdo testified, that O'Connell spoke for Mrs. Harkavy in respect to working conditions." (A. 39-41). It is well settled that strict common law principles of agency do not control determinations of employer responsibility for the coercive conduct of its employees. International Ass'n of Machinists v. N.L.R.B., 311 U.S. 72, 80 (1940);

^{9/} Although she was in layoff status at the time this conversation took place, Passannante was none the less an employee for the purpose of the Act. First, as we show, infra, pp. 22-29, Passannante's layoff was unlawful and, as Section 2(3) of the Act specifically provides, "the term 'employee' shall include any individual whose work has ceased . . . because of any unfair labor practice" Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 190-193 (1941). In any event, it has long been held that where, as here, the Company's business is seasonal in nature and the Company has a policy of recalling laid off employees (A. 1028), those individuals who are laid off retain their employee status. Marlin Rockwell Corp. v. N.L.R.B., 116 F.2d 586, 588 (C.A. 2, 1941), N.L.R.B. v. Atkinson Dredging Co., 329 F.2d 158, 160-164 (C.A. 4, 1964), cert. denied, 377 U.S. 965.

N.L.R.B. v. Arkansas-Louisiana Gas Company, 333 F.2d 790, 795 (C.A. 8, 1964). Where there exists a nexus between management and an employee's coercive conduct--whether by direction, approval, acquiescence or otherwise--then employer responsibility attaches. N.L.R.B. v. Dayton Motels, Inc., 474 F.2d 328, 331 (C.A. 6, 1973). As the Eighth Circuit has observed:

It is essential to the spirit and intent of the Act that management itself should not only refrain from any conduct which would be directly conducive to restraint of its employees in the free exercise of their rights under the Act, but also that no supervisory officers or employees of the management, whose duties, responsibility, and relationship to management are such that employees may reasonably assume their conduct and statements originate from and express the views of management, should bring about such coercion or restraint by their conduct. [N.L.R.B. v. Falls City Creamery, 207 F.2d 820, 829 (C.A. 8, 1953).]

Here the Company placed O'Connell in a position where many employees viewed her as "forelady" and part of management. O'Connell regularly gave out employee work assignments and answered employee questions, upon Mrs. Harkavy's instructions. In addition, it was her responsibility to maintain Company production records. Significantly, O'Connell's threats of plant closure and job loss closely paralleled statements that were made during the same period by President Harkavy. The employees therefore could well assume that the statements of O'Connell reflected the thoughts and intentions of management. It is settled that in these circumstances the Company is liable for O'Connell's coercive conduct. N.L.R.B. v. Falls City Creamery, supra; N.L.R.B. v. Dayton Motels, supra.

C. Soliciting Employees to Repudiate
the Union

Management solicitation of its employees to withdraw support from a union tends to impair the rights guaranteed by Section 7 to "freely join and assist labor organizations" and contravenes the "established rule that an employer cannot engage in conduct calculated to erode employee support for the Union." N.L.R.B. v. Deutsch Co., 445 F. 2d 902, 906, (C.A. 9, 1971), cert. denied, 405 U.S. 989. Accord: N.L.R.B. v. S. & H. Grossinger's, Inc., 372 F.2d 26, 29 (C.A. 2, 1967). Particularly in the context of an anti-union campaign, such conduct has consistently been held to violate Section 8(a)(1) of the Act. N.L.R.B. v. S. & H. Grossinger's, Inc., supra; Edward Fields, Inc. v. N.L.R.B., 325 F.2d 754, 760 (C.A. 2, 1963); Amalgamated Clothing Workers v. N.L.R.B., 424 F.2d 818, 824 (C.A.D.C., 1970).^{10/}

Here, the record shows that on the day of the Union's recognition demand, the Company commenced an intensive campaign of interrogation plus threats of job loss and plant closure. On the same day, the Company effectuated the first of a series of premature layoffs of Union supporters. The following day, Josephine O'Connell drafted a

^{10/} Compare, N.L.R.B. v. Monroe Tube, Inc., 545 F.2d 1320 (C.A. 2, 1976), where this Court specifically found no prior or contemporaneous anti-union campaign and further found the employer's efforts in seeking union withdrawal to be "de minimis", resulting in only one withdrawal out of a unit of fifty employees.

letter for the purpose of withdrawing employee authorization cards, visited employees Carmella Cacoperdo, Donna Moravec and Ana Nemec at their homes and secured their signatures. For the reasons discussed supra, pp. 18-19, the Board properly concluded that O'Connell was the Company's agent in seeking these employees' withdrawal from the Union. Furthermore, the employees' belief that O'Connell was acting for management may well have been strengthened by O'Connell's telling her co-signers that she would deliver to Mrs. Harkavy a copy of her petition (A. 39; 457-458, 919).

Especially in the context of its vigorous anti-union campaign, the Company's solicitation of signatures on the union repudiation petition plainly operated to deny the employees' freedom of choice in violation of Section 8(a)(1).

D. Promises and Grants of Benefits

It is settled law that conferring benefits on employees, or promising to confer benefits, in order to discourage union adherence violates Section 8(a)(1) of the Act. N.L.R.B. v. Exchange Parts Co., 375 U.S. 405, 409-10 (1964); N.L.R.B. v. A & S Electronic Die Corp., 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833; N.L.R.B. v. Patent Trader, Inc., 415 F.2d 190, 199 (C.A. 2, 1969), modified in banc on other grounds, 426 F.2d 791 (1970). In the present case, the Board properly found that O'Connell made unlawful promises of benefit to Cacoperdo following her signing of the anti-union petition. On the morning of October 7, during a discussion concerning the Union campaign and the

slowdown of work, O'Connell told Cacoperdo that when work improved, Mrs. Harkavy would take care of her. "We'll always have a job and we'll get a raise" she explained. As an inducement to assure Cacoperdo's abandonment of the Union, O'Connell's promise of benefit was unlawful.

II. SUBSTANTIAL EVIDENCE ON THE RECORD
AS A WHOLE SUPPORTS THE BOARD'S FINDING
THAT THE COMPANY VIOLATED SECTION 8(a)(3)
AND (1) OF THE ACT BY TERMINATING AND
THEREAFTER DENYING RE-EMPLOYMENT TO
EMPLOYEES MARGARET PASSANNANTE, MARY WHITE,
DONNA MORAVEC AND GRACE RUGOLO

A. The Layoffs

It is well settled that laying off employees because of their union sympathies violates 8(a)(3) and (1) of the Act. N.L.R.B. v. V & H Industries, Inc., 433 F.2d 9, 10 (C.A. 2, 1970); N.L.R.B. v. Diamond Standard Fuel Corp., 437 F.2d 1163 (C.A. 1, 1971), N.L.R.B. v. Rubin, 424 F.2d 748, 750-751 (C.A. 2, 1970). The Board found that the Company prematurely and unlawfully laid off employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo within two working days of the Union's demand for recognition. The only question presented is whether

substantial evidence considered on the record as a whole supports the Board's finding that the layoffs were motivated by anti-union reasons rather than by valid economic considerations as the Company contends.

In making this determination, this Court has recognized that, since the issue is one of subjective intent, direct evidence is usually not obtainable and discrimination can normally be proved only by the use of circumstantial evidence. See N.L.R.B. v. Link Belt Co., 311 U.S. 584, 602 (1941); N.L.R.B. v. Revere Metal Art Co., 287 F.2d 632, 633 (C.A. 2, 1961); N.L.R.B. v. Melrose Processing Co., 351 F.2d 693, 698 (C.A. 8, 1965). Thus, "[e]vidence of [motive] may consist of direct testimony by one whose motive is in question and of inferences of probability drawn from the totality of other facts." N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (C.A. 2, 1965). In reviewing the Board's finding, it is settled that ascertainment of an employer's motivation is within the province of the Board, whose determination "cannot lightly be overturned." United Aircraft Corp. v. N.L.R.B., 440 F.2d 85, 91-92 (C.A. 2, 1971); N.L.R.B. v. Advance Business Forms Corp., 474 F.2d 457, 464 (C.A. 2, 1973). We show below that the Board's finding that employees Passannante, White, Moravec and Rugolo were laid off because of their Union activities is amply supported by the record.

In July 1974 Rugolo, Moravec, White, Passannante and the other employees began talking openly about the advantages of a union bargaining representative. Rugolo volunteered to contact the Union and was the first employee to sign an authorization card. In addition, Rugolo provided the Union with other employees' names and addresses. The employees continued to discuss

the Union in the plant until about the end of September. On October 3, Passannante, White and Moravec signed Union cards. On October 4, the Union requested recognition from the Company and offered to prove their majority support. On the same day, Mrs. Harkavy threatened employees with loss of jobs, Mr. Harkavy threatened to close the plant and Mrs. Harkavy laid off Margaret Passannante. On the following Monday, Mrs. Harkavy laid off employee Mary White and on the day after that she laid off Grace Rugolo and Donna Moravec. This sudden layoff of four Union card signers, including the instigator of the Union drive, immediately following the Union's recognitional demand, provides prima facie evidence that the Company was motivated by their Union affiliation and activities. N.L.R.B. v. Rubin, supra; N.L.R.B. v. Pembeck Oil Corp., 404 F. 2d 105, 110 (C.A. 2, 1969), vacated and remanded on other grounds, 395 U.S. 828 (1969). The Company's extensive anti-Union campaign--including interrogations, threats and promises of benefits--further supports this conclusion. Indeed, "opposition to the union, as manifested by [the employer's] actions, including threats . . . is more than just 'some' evidence to support the Board's finding" of unlawful motivation. N.L.R.B. v. Princeton Inn Co., 424 F.2d 264, 266 (C.A. 3, 1970). Accord N.L.R.B. v. Rubin, supra; N.L.R.B. v. Dan River Mills, Inc., 274 F. 2d 381, 384 (C.A. 5, 1960).

The Company clearly knew or suspected that the four were sympathetic to the Union. Mrs. Harkavy admitted at the Board hearing that she had believed that only her more senior employees were loyal to her view that the plant should remain non-union (A. 43; 916-917).

As new hires, all four women were outside what Mrs. Harkavy believed was her loyal following. By the time Rugulo and Moravec were laid off on October 8, Mrs. Harkavy's suspicions were confirmed. That morning she observed the four--together with Union agents Sciacca and Rhatigan--engaging in handbilling activities at the plant entrance. Later that morning she specifically complained to Rugolo concerning the Union buttons she and Moravec wore to work. Moreover, the Company's plant, with only 13 employees, was a place where a worker's attitude toward the Union appeared to be common knowledge. Various employees testified that they knew who was for the Union or had signed authorization cards and Josephine O'Connell was evidently aware on October 5, of the identity of at least three cards signers she felt might sign her petition (A. 12, 40; 398-399, 579-581, 732-737). As noted, on several occasions, the employees spoke openly in the plant about their individual attitudes toward Union representation. Accordingly, the Board properly inferred that the Company knew or suspected which employees supported the Union. N.L.R.B. v. Pembeck Oil Co., *supra*; N.L.R.B. v. Abbott Worsted Mills, 127 F.2d 438, 440 (C.A. 1, 1942); N.L.R.B. v. A.J. Krajewski Mfg. Co. v. N.L.R.B., 413 F.2d 673, 676 (C.A. 1, 1969); American Sanitary Products Co. v. N.L.R.B., 382 F.2d 53, 56 (C.A. 10, 1967).

The fact that not all the card signers were laid off does not negate the Company's unlawful motive. The record shows that after the Company began its anti-union campaign, four out of the remaining five signers

who were not laid off made individual efforts to convince the Company of their continuing loyalty. O'Connell, Cacoperdo and Nemec signed a petition and gave a copy to Mrs. Harkavy in effect repudiating their Union affiliation; Carmen Gonzalez admitted upon Mrs. Harkavy's questioning that she had signed an authorization card but promised Mrs. Harkavy that she was "not a Union member now." (A. 647-648.) In any event, it is well settled that "a discriminatory motive otherwise established, is not disproved by an employer's proof that it did not [take similar action against] all union adherents." Nachman Corp. v. N.L.R.B., 337 F.2d 421, 424 (C.A. 7, 1964). Accord: N.L.R.B. v. W. C. Nabors Co., 196 F.2d 272, 276 (C.A. 5, 1952), cert. denied, 344 U.S. 865; N.L.R.B. v. Puerto Rico Telephone Co., 357 F.2d 919 (C.A. 1, 1966).

The Company has contended that the layoff of Passannante, White, Moravec and Rugolo was solely in response to a seasonal decrease in available work, coinciding with a cancellation of one of the Company's major orders later in September. The Company's evidence, however, far from demonstrating that the four were laid off for purely economic reasons, strongly suggests that the Company used the seasonal nature of its business to attempt to conceal its unlawful motives.

First, despite the alleged business slowdown, Mr. Harkavy admitted that until the September 29 Sweater Bee cancellation, there was

ample work for everybody in the shop to work full time (A. 42-43; 823-824). Indeed there was more work in the shop than the employees could handle for, as Mr. Harkavy also conceded, "We were unable to effect delivery [during that period] because we were not able to produce the merchandise on time."

(A. 43; 824.) Mr. Harkavy further stated that there was enough work for the Company's f yee complement to keep busy "until sometime in November" (A. 43, 824).^{11/} The only change in circumstances suggested by the Company to explain the sudden need, between October 4 and October 8, to terminate approximately one-third of its labor force, was the September 29 cancellation of part of the Sweater Bee order. According to Mrs. Harkavy, the cancellation was "a major factor" in the layoff (A. 43; 869). The evidence, however, makes plain that the cancellation had only minimal impact on the Company's prospects. First, the number of sweaters actually cancelled was approximately 130 dozen out of the total Sweater Bee order of 1000 dozen (A. 43; 817-819; 92-97, 106-129).^{12/} More importantly, the Company admitted that there continued to be hope for a rescission of the cancellation and indeed, although the 130 dozen that were cancelled were never shipped to

^{11/} Employee Gonzalez credibly testified before the Board that the work in the shop did not slow down at least until mid-October (A. 23; 641). This is confirmed by the evidence that: (1) after the layoff of Passannante, White, Moravec and Rugolo, Mrs. Harkavy was forced to occasionally assign Ana Nemec additional hours and (2) employee Delfino had so much work that she "did not have time" to take off to see her sick brother until October 18 (A. 23-24; 482, 704-705, 219-255).

^{12/} Mr. Harkavy admitted that he viewed orders in the range of 100 dozen as "a small quantity" (A. 43; 837).

Sweater Bee, their production was not interrupted and they were completed by the end of November (A. 43; 819-821, 839). Finally, as Mr. Harkavy explained, October's production was still critical to the Company because they were "extremely worried" about the Spuncraft order which was to be delivered at the end of the month (A. 43, 801).

Secondly, even assuming that a sudden business slowdown did take place, the manner in which the layoff was effected lends support to the conclusion that it was unlawfully motivated. As noted, the first four employees laid off were all union supporters and their layoffs were effected within a 3-day period. This procedure was a substantial change from previous years where the practice, when work began to run out, was to reduce employees hours, and to lay employees off at a much slower rate (A. 3, 43; 462-463, 193-235). Mrs. Harkavy explained that this procedure was changed in October 1974, in order to give the older employees a "full days work" (A. 43; 875). In light of her admitted belief that the older workers were in accord with her views regarding unions, her explanation only serves to confirm the Board's conclusion that the Company "expedited the layoff in question in order to reward its loyal

employees and punish the Union adherents so as to avoid unionization of its plant." (A. 42). ^{13/}

B. The Company's Discriminatory Refusal
to Rehire Passannante, White, Moravec
and Rugolo in the Spring of 1975

It is of course well settled that an employer violates Section 8(a)(3) and (1) of the Act by refusing to hire or rehire someone because of their prior union activity or membership. Phelps-Dodge v. N.L.R.B., 313 U.S. 177, 181-187 (1941); N.L.R.B. v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 999 (C.A. 2, 1976), cert. denied, ___ U.S. ___ (1977), 97 S. Ct. 1325; Marlin-Rockwell Corp. v. N.L.R.B., 133 F.2d 258, 260 (C.A. 2, 1943).

In the instant case the record shows that during the week ending May 17, 1975, the Company began to recall its previous season's employees. As Mrs. Harkavy admitted, the Company's practice was to accept previous employees back to work except in "isolated" instances.

^{13/} Furthermore, as the Board concluded, "Mrs. Harkavy's account of the order of layoff did not quite fit the actual event--a particularly strange phenomenon if, as the [Company] argues, the layoff comported 'from first to last' with its 'usual and normal' practice . . ." (A. 44). Thus, Mrs. Harkavy testified before the Board that she was "absolutely certain" Moravec "had to be" laid off first, despite her seniority, and White "had to be" second, and she gave a detailed explanation in terms of her alleged criteria. She insisted on her story even after her error was pointed out and after examining and conceding the accuracy of the payroll records showing that White was laid off a day before Moravec. Mrs. Harkavy's "stubborn adherence to error" (A. 44) seriously undermines her overall claim of economic motivation.

(A. 1026). Indeed, Mrs. Harkavy could not recall one specific employee (other than Passannante, White, Moravec and Rugolo) who the Company ever refused to re-employ (A. 857-858, 1026). Consistent with this policy, at least six employees from the previous season who sought work in 1975 were recalled (A. 27; 1003, 158-178). The Company failed, however, to recall Passannante, White, Moravec or Rugolo. Instead, soon thereafter, the Company began advertising for and hiring new employees off the street.

The pretextual nature of the reasons offered by the Company for rejecting the applications of the four, which they submitted in June and July, lends further support to the Board's finding. According to the Company, the primary reason for refusing to rehire Passannante and Moravec was its lack of work. The record, however, demonstrates that there was ample work for the pair. Thus the Company repeatedly placed advertisements in local newspapers seeking, among other things, "OPERATORS . . . SINGER, FLOOR HELP." Its need for good workers apparently became so great in September 1975, that its advertisement began to read: "OPERATORS, FLOOR HELP, STEAMERS, WILL TRAIN IF QUALIFIED." ^{14/}

^{14/} The Administrative Law Judge properly discredited Mrs. Harkavy's statement that the Company purposefully over-advertised for Singer operators in order to identify for possible applicants the type of work performed in the factory. (No such contention was raised concerning the advertisement for floor help.) Mrs. Harkavy conceded upon cross-examination that the nature of her business could have been indicated more clearly by a forthright description such as "sweater" or "knitwear manufacturer." (A. 1047, 1082). Mrs. Harkavy in addition admitted that she furnished the information for a trade magazine article describing the Company's 1975 operations. (A. 1051.) In pertinent part, the article states: "Singer or single needle units [are used] for putting in pockets and the like." (A. 236).

In addition to the six previous employees (Nemec, O'Connell, Philip Kilz, Cacoperdo, Eve and Delfino) who were recalled beginning on May 12, 1975, the Company hired fourteen new employees, including at least four machine operators and two separators. It is uncontested that Moravec and Passannante were amply qualified for such positions. Moravec had a full season with the Company as separator and floor help and had received a wage increase during that time; Passannante's work as a Singer operator was highly praised by Mrs. Harkavy. Even if Moravec and Passannante were not qualified for some of the advertised vacancies without retraining, the Board was entitled to take the Company at its word that, where necessary, it would train qualified applicants. The evidence thus strongly suggests that considerations other than lack of work motivated the Company's failure to rehire Moravec and Passannante.

Before the Board, the Company contended that it refused to rehire Mary White because she was incompetent. While White may not have been the most efficient operator, the evidence shows that until her layoff in October 1974, she was nonetheless retained by Mrs. Harkavy on the same machine. In addition Mrs. Harkavy testified that White was not terminated in 1974 because of her performance, but was laid off because of a lack of work (A. 1094, 1066, 926-927, 932). Upon cross-examination, Mr. Harkavy suggested for the first time that her failure to rehire White was also a consequence of an alleged drinking problem plus Mary White's failure to keep in touch (A. 1084-1090). Finally, Mrs. Harkavy stated "if you bring more [reasons] attention to me (sic), I will find more." (A. 1090).

Such belated explanations are by now a familiar signpost pointing to an employer's unlawful intent. See, e.g. N.L.R.B. v. Superior Sales, Inc., 366 F.2d 229, 235 (C.A. 8, 1966); A.J. Krajewski Manufacturing Co. v. N.L.R.B., *supra*; N.L.R.B. v. Mid State Sportswear, Inc., 412 F.2d 537, 539 (C.A. 5, 1969). Furthermore, the Board credited White's testimony that following her layoff in October 1974, she did contact the Company on several occasions seeking work and, in addition, that she must avoid alcohol because of a physical disability (A. 47; 1092-1093).

According to the Company, Rugolo was denied re-employment in 1975 primarily because of an alleged vulgar statement made to Mrs. Harkavy on the day of layoff. The Company's contention is supported only by the testimony of Mrs. Harkavy, which was specifically discredited by the Administrative Law Judge (A. 22, 45; 1040-1042, 1070-1073). Although employees Nemec, O'Connell and Caceperdo were also present at the time of the disputed incident, according to Mrs. Harkavy (A. 1042), the Company failed to have them testify. For her part, Rugolo admitted that she told Mrs. Harkavy that she was a "terrible boss" for failing to treat her employees properly, but credibly denied ever using vulgar language (A. 22, 30, 45; 999-1000).

The Company also contended that two days after her layoff, when Rugolo returned to the plant for her check, she called Mr. Harkavy a "crook." This defense however, like Rugolo's alleged vulgarity is inconsistent with the Company's admission that after each alleged name calling incident, either Mr. or Mrs. Harkavy specifically told Rugolo

that she was not being terminated but rather was laid off for lack of work (A. 1071-1073). In addition, this "misconduct" went unmentioned in Mrs. Harkavy's June 1975 letter rejecting Rugolo's request for rehire. Rather, like White's alleged drinking problem this ground was first offered during the cross-examination of Mrs. Harkavy on the last day of the hearing. As the Administrative Law Judge noted: "This shift in position and steady multiplication of grounds themselves suggest the insubstantiality of the defense. N.L.R.B. v. Schill Steel Products, Inc., 340 F.2d 568, 573 (C.A. 5, 1965)." (A. 45).

Under all the circumstances the Board reasonably found that the Company's premature layoff of employees Passannante, White, Moravec and Rugolo, as well as its failure to recall them, was intended to discourage union membership and was thus a violation of Sections 8(a)(3) and (1) of the Act. N.L.R.B. v. V. & H. Industries, *supra*; N.L.R.B. v. Rubin *supra*; N.L.R.B. v. A. Lasaponara and Sons, Inc., *supra*; Marlin-Rockwell Corp. v. N.L.R.B., *supra*.

III. THE BOARD'S BACKPAY REMEDY
IS VALID AND PROPER

It is well settled that a "finding of an unfair labor practice . . . is presumptive proof that some back pay is owed." N.L.R.B. v. Mastro Plastic Corp., 354 F.2d 170, 178 (C.A. 2, 1965), cert. denied, 384 U.S. 972; N.L.R.B. v. Charles T. Reynolds Box Company, 399 F.2d 668, 669 (C.A. 6, 1968). It is further clear that the Board has broad discretion in shaping the backpay remedy authorized by Section 10(c) of the Act to compensate the

victims of unlawful discrimination. The Supreme Court described the Board's powers in this area in N.L.R.B. v. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969):

We start with the broad command of § 10(c) of the National Labor Relations Act . . . that upon finding that an unfair labor practice has been committed the Board shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. This court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 216 (1974).

. . . As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953). "When the Board, 'in the exercise of its informed discretion,' makes an order or restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" Id. 345-347.

Here, the Board ordered backpay for Rugolo, Moravec, White and Passannante covering two separate periods: first, from the date of their premature layoff until the end of October 1974, when the Company was winding down its operation; second, from the week ending May 17, 1975, when the Company resumed production, until the date of a valid offer of reinstatement. The only substantial issue is whether the second period should begin in May 1975, as the Board directed, or on those dates in June and July 1975 when the four discriminatees sent the Company written requests for work, which the Company rejected or ignored.

It is well settled that an employer who unlawfully discharges an employee is obliged to offer him reinstatement, and that the employer's backpay liability continues until a valid offer is made. The law is also clear that in cases where a reduction in the employer's work force takes place following a discriminatory layoff, such that the discriminatee would have been laid off for purely economic reasons, the employer's backpay obligation may be suspended but will resume when work becomes available and will continue until a valid reinstatement offer is made. National Freight, Inc., 154 NLRB 621, 622 (1965); The Buncher Company, 131 NLRB 1444, 1445 (1961), enf'd 316 F.2d 928 (C.A. 3, 1963); Leo Rosenblum, 137 NLRB 1162, 1163-1164 (1962). In the instant case, the Company has been relieved from backpay liability for the period from October 31, 1974 until the week ending May 17, 1975. During that week, however, the Company commenced rehiring its old employees as it resumed production, but made no effort to recall the four discriminatees. The Board, applying its well-settled policy, held that the Company's obligation to recall the four discriminatees was revived at that point, along with its liability for backpay.

There is no merit in the Company's argument that this policy was misapplied, because it had an established practice of requiring laid-off employees to take the initiative and indicate their availability for work the following season. The record is far from clear, to being with, that any such practice was maintained. The Company's sole evidence is

Mrs. Harkavy's testimony, which is conclusory and devoid of specifics (A. 27). Significantly, the Company passed up the opportunity to corroborate Mrs. Harkavy by not calling to the stand the six employees who worked in 1974 (like the discriminatees) but were rehired in 1975, so that they might describe the circumstances of their recall. As the Board noted (A. 58), the Company admitted that on occasion it has taken the initiative in recalling former employees (A. 58; 1033, 1075, 1076). Indeed, as the Statement shows, about June 4, 1975, the Company contacted discriminatee Moravec about coming back to work, although she had not previously approached the Company.

Even if the Company had the claimed practice, however, the Board could reasonably conclude, as it did, that the Company had an obligation to seek out these discriminatees in May, and that the four did not forfeit their right to backpay because they did not approach the Company prior to that time. First, for all four discriminatees, 1974 was the initial season of employment by the Company. They therefore had not experience with the Company's recall practice.^{15/} More importantly, there

^{15/} When the Company laid them off, Mrs. Harkavy gave them the vague instruction to "keep in touch." In response, Passannante, Moravec and White contacted the Company two or three times during the week or so following the layoff (A. 278-280, 420, 593-594).

is no serious contention by the Company that any of the four would have been rehired if they had called the Company prior to the resumption of production in May.^{16/} Finally, if there is any question about whether an earlier application for rehire by the four would have made a difference, the uncertainty must be resolved against the Company since its unlawful conduct, as the Board noted (A. 57), "may well have coerced or restrained the discriminatees from applying for employment in the next season." N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 872 (C.A. 2, 1938), cert. denied 304 U.S. 576; N.L.R.B. v. Madison Courier Inc., 472 F.2d 1307, 1321 (C.A.D.C., 1972); Leeds and Northrup Co. v. N.L.R.B., 391 F.2d 874, 880 (C.A. 3, 1968). See also, Amsterdam Wrecking & Salvage Co., Inc. v. Local 294, Teamsters, 472 F.2d 153 (C.A. 2, 1973).

The Board's treatment of a parallel remedial situation--that of a discharged sympathy striker--lends additional plausibility to its remedy here. Thus, where a sympathy striker has been unlawfully discharged for making common cause with members of a different union, the employer is not liable for backpay while the strike continues, unless the dischargee makes an unconditional offer to return to work. However, when the strike ends, it is the employer which has the burden of approaching the strikers if it wishes to avoid liability for packpay. See, e.g., Southern Greyhound Lines, 169 NLRB 627 (1968), enf'd, 426 F.2d 1299 (C.A. 5, 1970);

^{16/} As discussed, the Company's position was that White was disqualified by reason of her drinking problem and inefficiency, while Rugolo had rendered herself unemployable by her abusive language. As to Moravec and Passanante, the Board rejected Mrs. Harkavy's suggestion that an earlier approach, with no flavor of union participation, would have led to a different result (A. 58).

Difco Laboratories Inc., 172 NLRB 2149 (1968), enf'd 427 F.2d 170 (C.A. 6, 1970), cert. denied. 400 U.S. 833; Nuodex Division of Tenneco Chemicals, Inc. 176 NLRB 611 (1969). The justification for this policy is that the employer knows when the strike is over whereas the discharged sympathy striker, who is not involved in the underlying dispute, may not. Furthermore, the sympathy striker, by virtue of discharge, has reason to believe that it will be futile to seek reinstatement. Here, in similar fashion, it was the Company which knew when jobs became available, and the four discriminatees could also reasonably have believed that applying for the former jobs would have been futile.

IV. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) BY REFUSING TO BARGAIN WITH THE UNION AND THAT A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICES

A. Applicable Principles

The legal principles relevant in cases of this nature are stated by the Supreme Court in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969). In Gissel, the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases such as this one where unfair labor practices have been committed "that interfere with the election." Id. at 594. The Court indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view

of their tendency to undermine the union's majority support, and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." Id. at 614.

Furthermore, the Court emphasized, "it is for the Board and not for the courts" to make the determination whether the effects of the employer's unfair labor practices can be erased without issuance of a bargaining order, "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." Id. at 612 n. 32.

Accord: M.P.C. Restaurant Corp. v. N.L.R.B., 481 F.2d 75, 79 (C.A. 2, 1973).^{17/}

B. The Union Established a Card Majority

The Company does not contest the appropriateness of the production and maintenance unit nor the Board's finding that 9 of the Company's 13 production employees had signed valid authorization cards for the Union by October 4, 1974 (A. 4, 49; 242). In any event, the record is clear that the

^{17/} The Court added: "In fashioning its remedies under the broad provisions of Section 10(c) of the Act, the Board draws on a special fund of knowledge and expertise all its own, and its choice of remedy must be given special respect by reviewing courts." Id. Accord: N.L.R.B. v. International Metal Specialties, Inc., 433 F.2d 870, 872 (C.A. 2, 1970), cert. den., 402 U.S. 907 ("Appellant's attack on the use of a bargaining order must fail, however, in light of the Supreme Court's decision in [Gissel], entrusting to the Board almost total discretion to determine when a bargaining order is appropriate"); Texaco, Inc. v. N.L.R.B., 436 F.2d 520, 525 (C.A. 7, 1971); N.L.R.B. v. Lou De Young's Market Basket, Inc., 430 F.2d 912 (C.A. 6, 1970).

cards, on their face, unequivocally declared their purpose to designate the Union as the employees' bargaining representative and each of the employees who signed a card read the card before doing so (A. 6 50-257, 261, 266-267, 271-278, 492, 81-88, 91). It is further undisputed that on the morning of October 4, 1974, the Union made a recognitional demand directly upon the Company's principal officers, offering to prove its majority support and, later that day, confirmed its demand in writing. As shown, the Company reacted to the Union's demand by commencing an extensive anti-union campaign designed to dissipate its support.

C. The Bargaining Order Was a Proper
Exercise of the Board's Discretion

As shown in the Statement, supra, pp. 5-6, immediately upon receipt of the Union's recognitional demand, Mrs. Harkavy interrogated employee Ana Nemec about her own and other employees' Union membership and sympathies. Following her interview with Nemec, Mrs. Harkavy questioned several other employees about the Union and threatened them with discharge. At noon on that day, President Murray Harkavy called all Company's employees to a meeting and threatened to close the plant if the Union campaign was successful.

That afternoon Mrs. Harkavy laid off Passannante. Over the weekend, Josephine O'Connell joined the Company's anti-union campaign. She solicited signatures of employees Cacoperdo, Moravec and Nemec on a petition repudiating their Union support, and advised the co-signing employees that she would supply Mrs. Harkavy with a copy. On Monday, October 7, she promised benefits in working conditions to employee Cacoperdo, warned Cacoperdo that Mrs. Harkavy would not bring in more work until the Union issue was settled, and threatened that Mrs. Harkavy would "rather close the shop than have the Union in." On the same day, Mrs. Harkavy terminated employee White and on the following day she terminated Moravec and Rugolo. Mrs. Harkavy thereafter continued her campaign of coercive interrogation with employees Gonzalez and Zimmerman. Thus, within one week of its receipt of the Union's recognition demand, the Company coercively interrogated or threatened every employee in the plant and laid off almost one-third of its entire employee complement because of their Union activities and sympathies.

Particularly in a "small, closely knit unit" (N.L.R.B. v. Scoler's, Inc., 466 F.2d 1289, 1293 (C.A. 2, 1972)), such as this, the Board could reasonably conclude that the foregoing misconduct was "so extensive and serious as to render impossible or at least unlikely the holding of a fair and free election." (A. 59). Indeed, this Court and other courts have repeatedly enforced similar bargaining orders where the employer's

violations were less egregious and the improbability of a fair election less clear. See e.g. N.L.R.B. v. Scoler's, Inc. *supra*, (coercive interrogation, threats to punish union adherents and reward union opponents); Byrne Dairy, Inc. v. N.L.R.B., 431 F.2d 1363, 1364 (C.A. 2, 1970) (coercive interrogations and threats of reprisals); N.L.R.B. v. Production Industries, Inc., 425 F.2d 1206 (C.A. 6, 1970) (coercive threats and interrogation, promises and grants of benefits); N.L.R.B. v. South Bay Daily Breeze, 415 F.2d 360, 362, 367 (C.A. 9, 1969), cert. denied, 397 U.S. 913 (threats of reprisal for union activity, promises of benefit).

There is no merit in the Company's argument that its turnover each year makes a bargaining order unnecessary and unfair. To the contrary, the record is clear that many employees remain in its employ season after season (A. 27; 158-178, 193-235). Indeed, but for the Company's unlawful refusal to recall Passannante, White, Moravec and Rugolo, 10 of its 13--1974 employees, might well have been working for the Company in 1975. Furthermore, as noted above, p. 30, Mrs. Harkavy admitted that she could not recall a single employee she had refused to rehire prior to her rejection of the four discriminatees. Compare, N.L.R.B. v. American Cable System, Inc., 427 F.2d 446, 448 (C.A. 5, 1970), cert. denied, 400 U.S. 957, where the evidence showed 100 percent turnover of unit employees.

The Board properly found that the Company's conduct also constituted a violation of Section 8(a)(5). Since its decision in The Trading Port, Inc., 219 NLRB 298, 300-301 (1975), the Board's policy has been to find a violation of the duty to bargain dating from the time an employer, who is faced with a sustainable claim of majority, rejects a bargaining demand in favor of a course of conduct calculated to destroy the union's majority and preclude a fair election. See, e.g., Ann Lee Sportswear, Inc. v. N.L.R.B., 543 F.2d 739, 744 (C.A. 10, 1976); Independent Sprinkler & Fire Protection Co. 220 NLRB 941, 941 n. 2, 963-965 (1975), enf'd, 546 F.2d 908 (C.A. 5, 1977) (mem.). For the reasons already discussed, this case contains all the requisite elements for the Board's conclusion that the Company's conduct on and after October 4, 1974--the date it launched its anti-union campaign--was in violation of a bargaining obligation which attached at that time. Nor is that conclusion impaired by the absence of an 8(a)(5) allegation in the complaint. As the Board noted, the complaint did contain the allegation that the Company's refusal to bargain violated Section 8(a)(1) of the Act. (A. 54, 74, 76). The Company had ample opportunity to present witnesses and introduce evidence in its defense. Almost every element of the 8(a)(5) violation found--the Union's majority and the Company's multiple unfair labor practices-- were necessarily and exhaustively litigated in the context of the General Counsel's demand for a Gissel bargaining order. The remaining element--the Union's request for bargaining--was readily established and is not in dispute. Under these circumstances, the Board was unquestionably entitled to find the

alleged violation and to provide a responsive remedy. E.g., N.L.R.B. v. Mackay Radio and Telegrpah Co., 304 U.S. 333, 349, 351 (1938); N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941, 947-948 (C.A. 1, 1961); Curtiss-Wright Corp. v. N.L.R.B., 347 F.2d 61, 72 (C.A. 3, 1965).

In sum, the Board's issuance of a bargaining order was a proper exercise of its discretion and was well within the limits previously approved by this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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